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No. 73-524

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In the Supreme Court of the United States

OCTOBER TERM, 1973

YVONNE ALVAREZ SCHENNAULT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND KEVIN E. NESTOR, SPECIAL AGENT, INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Following petitioners' refusal to comply with Internal Revenue Service summonses requiring production of books and records of petitioner Capital Enterprize Building Corporation, Special Agent Nestor and the United States initiated this proceeding to enforce the summonses under Section 7604, Internal Revenue Code of 1954 (Pet. 4-5). The district court denied all petitioners' motions for discovery and production of Internal Revenue Service files but did allow them to take the deposition of Special Agent Nestor. However, the court denied petitioners' motions to compel Nestor to answer certain interrogatories concerning conversations he had with agents of the Bureau of Narcotics and Dangerous Drugs (Pet. App. 4-5). The district court ordered petitioners to produce the summoned books and records, and the Seventh Circuit affirmed (Pet. App. 2-10).

2. Both courts below correctly applied the standards for enforcement of an Internal Revenue Service summons announced in *Donaldson* v. *United States*, 400 U.S. 517. There, this Court unanimously held that "under §7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution" (400 U.S. at 536). In order to quash the summons, the summoned party must show an abuse of process, such as an improper purpose reflecting on the good faith of the investigation. *United States* v. *Powell*, 379 U.S. 48, 58.

Petitioners have not shown either that the summons was issued after a recommendation for criminal prosecution or that the agent acted other than in good faith in issuing the summons. To the contrary, the government established through the testimony of the agent (R. 73-74, 104)[1] that the purpose of the summons was to investigate the income tax returns of petitioner Capital Enterprize Building Corporation. As the court of appeals stated (Pet. App. 7), the lower courts have unanimously held that "so long as the determination of civil tax liability is *one* of the purposes for issuance of a summons, the [*Donaldson*] test of good faith has been met [emphasis in original]." See, *e.g.*, *United States* v. *Cleveland Trust Co.*, 474 F. 2d 1234, 1236 (C.A. 6), certiorari denied *sub nom. Miceli* v. *United States*, No. 72-1606, October 9, 1973; *United States* v. *Wall Corp.*, 475 F. 2d 893, 894-895 (C.A. D.C.); *United States* v. *Richardson*, 469 F. 2d 349, 352 (C.A. 10); *United States* v. *National State Bank*, 454 F. 2d 1249, 1251-1252 (C.A. 7); *United States* v. *Couch*, 449 F. 2d 141, 143 (C.A. 4), affirmed, 409 U.S. 322; *United States* v. *Troupe*, 438 F. 2d 117, 119 (C.A. 8).

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[1] "R." references are to the appendix in the court of appeals.

3. Petitioners do not challenge the finding of good faith made by the courts below. However, they contend (Pet. 11-12) that the *Donaldson* test of summons enforceability is inapplicable because agents of the Bureau of Narcotics and Dangerous Drugs gave to the Internal Revenue Service the information leading to the tax investigation. But there is no bar in *Donaldson* or elsewhere which would preclude the Internal Revenue Service from acting upon an investigatory lead from another government agency or from any other source. *E.g., United States* v. *Cleveland Trust Co., supra; United States* v. *DeLuca,* 30 A.F.T.R. 2d 5771 (E.D. N.Y.), affirmed, 31 A.F.T.R. 2d 1310 (C.A. 2); *United States* v. *Troupe, supra; United States* v. *Stamp,* 458 F. 2d 759 (C.A. D.C.), certiorari denied, 409 U.S. 842. See also *United States* v. *Fruchtman,* 421 F. 2d 1019 (C.A. 6).[2]

Abel v. *United States,* 362 U.S. 217, relied upon by petitioners (Pet. 10), has no bearing on the issue here. That case concerned the propriety of using, in a subsequent unrelated criminal prose-

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[2]Contrary to petitioners' assertion (Pet. 11), *Donaldson* cannot be limited to the case where the only possible criminal conduct is tax evasion. This Court's opinion (400 U.S. at 532, n. 13) cites with approval *Venn* v. *United States,* 400 F. 2d 207 (C.A. 5). There, an Internal Revenue Service summons was enforced notwithstanding the existence of a criminal antitrust prosecution against the summoned third party, in which discovery of much the same material was sought with limited success. Because of the existence of the criminal prosecution, the government assured the Fifth Circuit that the material would be used only for the purpose of investigating the liability of the taxpayer and not in the antitrust case. See also *United States* v. *Stamp,* 458 F. 2d 759, 776 (C.A. D.C.), certiorari denied, 409 U.S. 842; *DiPiazza* v. *United States,* 415 F. 2d 99, 106-107 (C.A. 6).

cution, evidence which had been obtained pursuant to an administrative warrant. The Court concluded that the evidence was admissible in the criminal prosecution because the administrative warrant was issued in a bona fide manner and was not used as an instrument of criminal law enforcement. Under this standard, it would appear that any evidence obtained by use of the Internal Revenue Service summons would be admissible in a subsequent criminal proceeding. However, if and when there is any prosecution of petitioners under the narcotics laws, the question whether *Abel* would prohibit the use of any information obtained by the present investigation may be considered. See, *e.g., United States* v. *Blue,* 384 U.S. 251, 255.

4. Contrary to petitioners' argument (Pet. 12), they were not entitled to "a protracted adversary hearing" in order to show the lack of good faith in the issuance of the summons. This Court in *Donaldson* (400 U.S. at 528-529) expressly recognized that Rule 81(a)(3) of the Federal Rules of Civil Procedure empowers a district court to suspend or limit discovery in a summons enforcement proceeding. As the court of appeals observed (Pet. App. 10), this limitation was "well within the district court's discretion under applicable case law." *United States* v. *Turner,* 480 F. 2d 272 (C.A. 7); *United States* v. *Wall Corp., supra, States* v. *Wall Corp., supra,* at 895; *United* at 895; *United States* v. *National State Bank, supra,* at 1252 and *United States* v. *Bell,* 448 F. 2d 40, 42 (C. A. 9).

Finally, there is no conflict, as alleged by petitioners (Pet. 16), between the decision below and *United States* v. *Roundtree,* 420 F. 2d 845 (C.A. 5), or with *United States* v. *Salter,* 432 F. 2d 697 (C.A. 1), with respect to the availability of pretrial discovery in summons enforcement proceedings. All *Roundtree* held was that the taxpayer should have been permitted to depose the revenue agent, a privilege which petitioners were accorded in this case. In this respect, the *Salter* holding is identical. See 432 F. 2d at 701, n. 7. However, to the extent that *Roundtree* enunciates a less stringent standard than *Salter* and the decision below as to under what circumstances discovery is available, those observations were made prior to this Court's *Donaldson* decision and were modified by the Fifth Circuit after *Donaldson* in *United States* v. *Newman,* 441 F. 2d 165, 169-170. The Fifth and First Circuits, as well as the decision below, presently permit a district court to grant the use of discovery in a summons enforcement proceeding only where the taxpayer raises in "a substantial way" evidence which supports his allegations of "substantial deficiencies" in the issuance of the summons.

For the reasons stated, it is repectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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